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‘I just wanted him to hear me’: Sexual Violence and the Possibilities of Restorative Justice

CLARE MCGLYNN^{*}, NICOLE WESTMARLAND^{} AND NIKKI GODDEN^{***}**

The use of restorative justice in cases of sexual violence is highly contentious. Resistance comes from those who argue that it may trivialise violence against women, re-victimise the vulnerable and endanger the safety of victim-survivors. On the other hand, from the perspective of victim-survivors, it may enable us to hear their stories more holistically; it may offer greater control, validation and may reduce victim-blaming. It may also provide an additional opportunity to secure some form of justice. Debate over the validity of these competing claims has largely taken place in an empirical vacuum. To begin to remedy this gap in our knowledge, and particularly our understanding of victim-survivor perspectives, this article considers the results of an exploratory study which investigated a restorative justice conference involving an adult survivor of child rape and other sexual abuse. The results of this case study, while necessarily tentative, provide good ground to consider afresh the possibilities of restorative justice in cases of sexual violence. We suggest that for those victim-survivors who wish to pursue this option, restorative justice may offer the potential to secure some measure of justice.

The use of restorative justice in cases of sexual violence is highly ‘contentious’.¹ From the perspective of victim-survivors, restorative justice may enable us to hear victim-survivors’ stories more holistically, to give voice to the real harms of sexual offences, helping to ‘name our own experience’² in a manner not possible in the conventional, adversarial justice process. It may afford victim-survivors greater control and decision-making, offering empowerment. It may encourage admissions of offending, offering validation and, in focussing on the offender, may reduce victim-blaming. Nonetheless, resistance comes from those who argue that it may trivialise violence against women, re-victimise the vulnerable and endanger the safety of victim-survivors. Such concerns are felt particularly acutely within some violence against women scholarly and practice communities.³ Angela Cameron argues, for example, that to introduce restorative justice is to ‘gamble’ with women’s lives.⁴ Similarly, Ruth Lewis et al have suggested that restorative conferencing is just another

^{*} Professor of Law, Durham Law School, Durham University.

^{**} Senior Lecturer in Criminology, School of Applied Social Sciences, Durham University.

^{***} PhD candidate, Durham Law School, Durham University.

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¹ J. Brown *et al*, *Connections and Disconnections: Assessing Evidence, Knowledge and Practice in Responses to Rape* (2010) 21.

² L. Kelly, ‘What’s In A Name? Defining Child Sexual Abuse’ (1988) 28 *Feminist Review* 65 at 66.

³ For detailed discussion of restorative justice and violence against women, see J. Ptacek (ed), *Restorative Justice and Violence Against Women* (2010) and J. Braithwaite and H. Strang (eds), *Restorative Justice and Family Violence* (2002).

⁴ A. Cameron, ‘Stopping the Violence’ (2006) 10 *Theoretical Criminology* 49, at 59.

example of an attempt to ‘divert’ violence against women ‘away from the justice system and into the hands of others’.⁵

Debate over the validity of these competing claims has largely taken place in an empirical vacuum. Indeed, there are no published evaluations regarding restorative justice and sexual violence in the UK and, internationally, there is a ‘profound lack of empirical evidence’ in the field.⁶ Furthermore, the evidence that does exist reveals little about victim-survivor experiences. To begin to remedy this gap in our knowledge, and particularly our understanding of victim-survivor perspectives, we undertook an exploratory study which investigated the participants’ experiences of a restorative justice conference involving an adult survivor of child rape and other sexual abuse. The results of this case study, while necessarily tentative, provide good ground to consider afresh the possibilities of restorative justice in cases of sexual violence. Finally, it may provide an additional opportunity to secure some form of justice for those victim-survivors who wish to pursue this option, either as an alternative, or in addition, to traditional criminal justice interventions.

To develop this argument, we begin by examining the current UK political and policy climate which is increasingly favourable towards restorative justice generally, but has yet to give any detailed consideration to its role in relation to sexual offences. This discussion also considers the extent to which restorative justice is currently used in sexual offence cases in the UK and the international research evidence regarding restorative practices in cases of sexual violence.⁷ In part two, we detail the case study at the heart of this article in which a restorative justice conference tackled a case of child rape and sexual abuse. Part three places this study within the overall context of recent developments and emerging trends in rape law and policy. Possible ways forward for the use of restorative justice in cases of sexual violence are then considered in part four. Finally, we conclude by adding weight to the call for a ‘redefinition’ of justice for victim-survivors⁸, one which is open to the possibilities of restorative justice in some cases of sexual violence for those victim-survivors who request it and where the necessary support is available.

I BEYOND CONVENTIONAL CRIMINAL JUSTICE: TOWARDS RESTORATIVE JUSTICE?

Restorative justice continues to play an important role in criminal justice policy in England & Wales. The Government is planning to extend the use of restorative justice at ‘each stage’ of the justice system, particularly in relation to ‘low-level crime’ and youth offenders.⁹ Victim Support has also recently called for all victims of burglary, robbery and ‘violence against the

⁵ Ruth Lewis et al ‘Law’s Progressive Potential: the Value of Engagement with the Law for Domestic Violence’ (2001) 10 *Social and Legal Studies* 105, at 123.

⁶ K. Daly, ‘Restorative Justice and Sexual Assault – An Archival Study of Court and Conference Cases’ (2006) 46 *British Journal of Criminology* 334 at 336.

⁷ Our focus is on restorative justice in cases of sexual violence and not domestic violence. While women’s experiences of victimisation do not conform to clear categories, there are sufficient variations between domestic violence and many forms of sexual violence justifying differential treatment. For discussion of restorative justice and domestic violence, see J. Pennell and S. Francis, ‘Safety Conferencing – Toward a Coordinated and Inclusive Response to Safeguarding Women and Children’ (2005) 11(5) *Violence Against Women* 666.

⁸ Sara Payne, *Redefining Justice: addressing the individual needs of victims and witnesses* (2009) available at: <http://www.justice.gov.uk/sara-payne-redefining-justice.pdf>.

⁹ Ministry of Justice, *Breaking the Cycle – Government Response* (2011) 9.

person' to have access to restorative justice¹⁰; a recommendation echoed in other recent reviews of the justice system.¹¹ In these contexts, 'restorative justice' is used as a generic term to cover many different processes, all of which revolve around a common core, usefully defined by Tony Marshall as: 'a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.¹² The 'process' can take many different forms, with the focus of this article on restorative conferencing where the offender and victim meet face to face, together with other community and/or family supporters, with dialogue managed by a trained restorative justice facilitator.¹³

There is, however, some confusion as to the nature of restorative justice which contributes to some misguided criticisms. Sarah Curtis-Fawley and Kathleen Daly trace some of the scepticism over restorative justice for sexual violence back to concerns expressed by feminists in the 1990s over the use of civil mediation, especially in divorce.¹⁴ There are, however, key differences between civil mediation and restorative justice. Mediation necessarily involves *mediating* facts between individuals seeking to resolve a 'dispute', with the implication that no blame is apportioned. In contrast, restorative justice is predicated on an acknowledgement by the offender that a criminal offence has taken place.¹⁵ The roles of 'victim' and 'offender' are, therefore, clearly established: there is no fact-finding. In addition, resistance appears to be based on the assumption that restorative practices only 'divert' cases away from the conventional justice system, thereby foreclosing any possibility of a conviction and conventional punishment. In fact, restorative justice can be used at many different stages of the criminal justice system, including pre-sentence, as part of a sentence and post-conviction.¹⁶ It can also be used entirely separately from the criminal justice system for example where there has been no police report.¹⁷ A further concern may also be with the common emphasis in restorative justice practices on the reparation of harm, rather than punishing the offender. However, the way in which harm is repaired by the offender through

¹⁰ Victim Support, *Victims' Justice? What Victims and Witnesses Really Want from Sentencing* (2010) 30.

¹¹ See Independent Commission on youth crime and anti-social behaviour, *Time for a New Hearing – A Comparative Study of Alternative Criminal Proceedings for Children and Young People* (2010) and Commission on English Prisons Today, *Do Better Do Less – The Report of the Commission on English Prisons Today* (2009).

¹² Tony Marshall, *Restorative Justice: An Overview* (1999) 5. While this is a widely deployed definition, concern has been expressed that it places too much emphasis on the process, rather than the values, of restorative justice. For a discussion, see: J. Dignan, *Understanding Victims and Restorative Justice* (2005).

¹³ For further discussion, see Marshall, *ibid* and M. Liebmann, *Restorative Justice: How it Works* (2007).

¹⁴ S. Curtis-Fawley and K. Daly, 'Gendered Violence and Restorative Justice – The Views of Victim Advocates' (2005) 11(5) *Violence Against Women* 603 at 607. See also K. Daly and J. Stubbs, 'Feminist Engagement with Restorative Justice' (2006) 10(1) *Theoretical Criminology* 9, 17-19.

¹⁵ There will be different understandings of acceptance and understanding of, and responsibility for, the offending behaviour. Nonetheless, it can be argued that one aim of the restorative justice process is to deepen the offender's understanding of the harm that they caused and therefore of the offender's responsibility: S. Jülich *et al*, *Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence* (2010) 38, at http://aut.academia.edu/documents/0121/2233/The_Project_Restore_Report.pdf.

¹⁶ J. Shapland *et al*, 'Situating Restorative Justice Within Criminal Justice' (2006) 10 *Theoretical Criminology* 505.

¹⁷ For example, Project Restore in New Zealand takes referrals from the community and individuals where there has been no police report. An evaluation of the project notes that in some cases this may be because of a reluctance to report family members to the police, but at the same time victim-survivors' having a strong need for a voice and a desire for some form of justice: above n 14 at 17 and 26. In non-report cases, offenders are urged to seek legal advice and are reminded that while the process is confidential this cannot necessarily be guaranteed.

restorative justice processes is important and can include alternative forms of punishment; rather than restorative justice necessarily being seen as an ‘alternative to punishment’.¹⁸

Returning to the current policy context, there was similar political enthusiasm for restorative justice in the late 1990s which saw the introduction of restorative approaches to youth justice and government rhetoric suggested embedding restorative justice in the criminal justice system.¹⁹ And yet descriptions of restorative justice projects being ‘scattered and isolated’,²⁰ and vulnerable to cuts,²¹ remain as true today as when they were first offered over a decade ago. Further, with the exception of restorative youth conferencing in Northern Ireland,²² the youth justice system has largely failed to embrace restorative approaches in all but a few cases.²³

The irony of this largely rhetorical debate is that where projects have been evaluated, they have generally produced very positive results in terms of victim and offender satisfaction and often in terms of reducing reoffending.²⁴ Indeed, contrary to popular wisdom, which appears to associate restorative justice with youth crime and/or minor offences, research has suggested that restorative justice seems to reduce crime more effectively with more, rather than less, serious crimes and in those crimes where there is a personal victim.²⁵ Thus, as Lawrence Sherman and Heather Strang conclude, the ‘evidence on restorative justice is far more extensive, and positive’ than is the case for ‘many other policies which have been rolled out nationally’.²⁶

However, while restorative justice, in general, may be among the ‘most over-evaluated and under-practiced’²⁷ areas of criminal justice, this is by no means the case in relation to its use in cases of sexual violence. Indeed, there are no published evaluations regarding restorative justice and sexual violence in the UK and, internationally, there is a ‘profound lack of empirical evidence’ in this field.²⁸ Furthermore, the evidence that does exist reveals little about victim-survivor experiences and reflections. This is partly due to the exclusion of sexual violence from most restorative justice programmes, in the UK and across the world. However, this scepticism towards restorative justice, while understandable, does result in a

¹⁸ A. Duff, ‘Alternatives to punishment and alternative punishments’, in W. Cragg (ed) *Retributivism and its Critics* (1992) 44.

¹⁹ The Crime and Disorder Act 1998 and Youth Justice and Criminal Evidence Act 1999 introduced referral orders in England & Wales which are used as a standard disposal for a first offence where the young person has pleaded guilty to an offence punishable by imprisonment. See also Home Office, *Restorative Justice: the Government’s Strategy* (2003).

²⁰ Marshall, above n 12, 20.

²¹ D. Miers *et al*, *An Exploratory Evaluation of Restorative Justice Schemes* (2001) ix.

²² See C. Campbell and D. O’Mahony, ‘Mainstreaming Restorative Justice for Young Offenders through Youth Conferencing: the Experience of Northern Ireland’, in J. Junger-Tas and S.H. Decker (eds) *International Handbook of Juvenile Justice* (New York: Springer, 2006) 93-116.

²³ Referral orders are only partly restorative and have low levels of victim participation. See Independent Commission on youth crime and anti-social behaviour, above n 12 at 12 and C. Hoyle, *Restorative Justice Working Group Discussion Paper* (2010) at:

http://www.prisoncommission.org.uk/fileadmin/howard_league/user/pdf/Commission/Howard_League_RJ_Working_Group_Discussion_Paper.pdf.

²⁴ J. Shapland *et al*, *Restorative Justice in Practice – Findings from the Second Phase of the Evaluation of Three Schemes* (2006), *Restorative Justice: The Views of Victims and Offenders* (2007) and *Does Restorative Justice Affect Reconviction? – The Fourth Report from the Evaluation of Three Schemes* (2008).

²⁵ L.W. Sherman and H. Strang, *Restorative Justice: The Evidence* (2007) 8.

²⁶ Ibid at 4.

²⁷ Hoyle, above n 23.

²⁸ Daly, above n 6 at 336.

vicious cycle: there are few projects, therefore little empirical evidence, leading to continued theoretical discussion, with the attendant critique that the literature is full of theoretical discussion, rather than empirically based evaluations. Nonetheless, this lack of evaluative evidence must not be taken as meaning that there are no examples of restorative justice being used in cases of sexual violence; merely that it is taking place under our radar.

1. *Under the radar: restorative justice and sexual violence in the UK*

There are a number of examples of restorative justice being used in cases of sexual violence in the UK. One recent newspaper article reported a restorative meeting between a rape victim-survivor and the man convicted of her attack. The victim-survivor had faced the offender in court but ‘hadn’t had the opportunity to tell him how he’d made me feel’.²⁹ In particular, she was prompted to participate in a restorative conference by the judge’s comment to the offender that he had ‘ruined this woman’s life’³⁰ which, unintentionally, shifted power back to the offender. The victim-survivor commented: ‘this wasn’t what I wanted and wasn’t how I saw it’.³¹ During the meeting, the victim-survivor explained the impact of the abuse: ‘He heard it from me that day, what he’d done to me, not from someone else saying how I might feel.’³² Afterwards, she concluded: ‘I got complete closure from that meeting.’³³ Another recent report details a restorative meeting, again after the offender had been imprisoned for rape, and at the instigation of the victim-survivor who wanted to address ‘unresolved issues’ and to try to get the offender to ‘see me as a real person whom he had harmed and not as a crime statistic’.³⁴ For this victim-survivor, the restorative experience did not provide ‘closure’, but ‘allowed me to be heard’ and, overall, the process ‘provided a great deal of support and stopped me channelling my anger into total destructiveness’.³⁵

In addition to these ad hoc uses of restorative justice, the AIM project in Manchester uses a variety of restorative practices in its work with young sexual offenders, usually following youth justice referral orders.³⁶ AIM has published detailed practice guidance on the use of restorative justice in cases of sexual violence³⁷ and has found in its experience that ‘overwhelmingly what participants’ value the most highly is the opportunity to have dialogue around the harm and consequences of abuse’.³⁸

²⁹ Quoted in Z. Williams, ‘Restorative Justice: Why I Confronted the Man who Raped Me’, *The Guardian*, 27 January 2011.

³⁰ *ibid.*

³¹ See also Restorative Justice Council, ‘Jo’s Story’, at http://www.restorativejustice.org.uk/resource/jos_story/.

³² *ibid.*

³³ Williams, above n 29.

³⁴ M. Harris, ‘Why I had to Meet the Man who Raped Me’ (6 February 2010) at <http://www.thisiskent.co.uk/news/meet-manwho-raped/article-1810563-detail/article.html>. See also D. Barrett, ‘Why I confronted the man who rape me’, *The Telegraph*, 12 March 2011.

³⁵ Harris, *ibid.* This meeting took place in Kent which is the setting of a current evaluation of victim-offender dialogue prison programmes and includes rape cases: Restorative Justice Council Newsletter, *Resolution* (edition 39, Winter 2010) 8, at http://www.restorativejustice.org.uk/assets/_ugc/fetch.php?file=qgax_rjc_member_publications_8wwys.pdf. It will be essential that this study disaggregates any findings by offence, so that we can understand any specific experiences or needs when dealing with sexual offences.

³⁶ J. Henniker and V. Mercer, ‘Restorative Justice: Can it Work with Young People who Sexually Abuse?’ in M. Calder (ed), *Working with Young People who Sexually Abuse: Taking the Field Forward* (2007) 230.

³⁷ See the AIM website at <http://www.aimproject.org.uk/>.

³⁸ Henniker and Mercer, above n 36, 242.

While these ad hoc examples of restorative practices are starting to be discussed in the media, and the AIM project begins to gain recognition for its innovative work, the Northern Ireland experience has slipped under the radar. Restorative youth conferences tackle a wide range of offences, including sexual offences.³⁹ Regrettably, however, there is no published evidence on exactly how many conferences have dealt with sexual offences. Nor is there evidence as to whether or not the high levels of victim-survivor satisfaction or reduced re-offending vary depending on whether or not the offences were sexual in nature. There is a significant untapped well of experience here which could inform future practice regarding the use of restorative justice for offences of sexual violence. This is a particularly pressing concern in view of the fact that the Government is considering expanding the use of restorative justice for youth offending.⁴⁰

There are, therefore, a number of examples of restorative justice being used in cases of sexual violence across the UK, mostly for youth offending, but almost no policy-level or political discussion which reflects this reality. Referral Orders are netting sexual offences and an unknown number may be using restorative practices to deal with sexual offending. Northern Ireland's restorative youth conferences inevitably tackle sexual offences, but there is no publicly available data on numbers or details of victim satisfaction, nor are the details of the specific practices adopted in these complex and sensitive cases widely publicised or debated. The Government's Green Paper calling for an increase in restorative justice assiduously avoids discussion of sexual violence, despite its emphasis on victim satisfaction and the Government's recent call for a 'comprehensive rethink' of how we support victims.⁴¹ Our aim here is to highlight that restorative justice is currently being used in a variety of contexts across the UK, but there is little discussion of this reality or of the implications for different types of offences and offenders. The work in different policy fields is not being 'joined up', with the real risk that the needs and experiences of sexual violence victim-survivors are forgotten.

2. Gaining a 'sense of justice'? Evaluating restorative justice for sexual offences

As a result, we need to look further afield for evaluations of restorative projects dealing with sexual violence. Project Restore in New Zealand is a 'survivor driven organisation' offering restorative conferences in cases of sexual violence.⁴² It aims to provide a 'sense of justice, support offenders to understand the impacts of their behaviour and facilitate the development of an action plan which might include reparation to the victim and therapeutic programmes for the offender'.⁴³ The Project aims to be 'truly victim-centred',⁴⁴ partly by empowering victim-survivors to take many of the decisions regarding the restorative justice conference, but also by the specific inclusion of victim advocates, referred to as 'community experts',

³⁹ Offences which attract a life sentence, such as rape, are excluded, as well as indictment only and certain terrorism offences: Justice (Northern Ireland) Act 2002, sec 59.

⁴⁰ Ministry of Justice, above n 9, para 239.

⁴¹ Ministry of Justice, *Breaking the Cycle – Effective Punishment, Rehabilitation and Sentencing of Offenders* (2010) para 83, drawing on a number of recent reports which have challenged the marginalisation of victims. As the 'victims' commissioner' Louise Casey states, despite the 'range of initiatives, the rafts of codes, charters, guidance notes and performance targets' victims remain the 'poor relation' in the criminal justice system. L. Casey, *The Poor Relation – Victims in the Criminal Justice System* (2010) 2.

⁴² S. Jülich *et al*, above n 14.

⁴³ Ibid at 1. See also S. Jülich, 'Restorative Justice and Gendered Violence in New Zealand – A Glimmer of Hope' in J. Ptacek (ed), above n 3, 246.

⁴⁴ Jülich, 'Restorative Justice and Gendered Violence in New Zealand', *ibid*, 246.

both in the preparation of conferences and during the conference itself.⁴⁵ Established following extensive community consultations, the Project operates on a small-scale, having dealt with 29 referrals (from the courts, community and individuals) which have progressed to nine conferences. A recent evaluation reported that this small number demonstrates the ‘rigorous processes’ and ‘very conservative approach to risk and readiness’⁴⁶ by which cases are assessed, with a view to ensuring that a conference is safe and appropriate for all.⁴⁷ It also perhaps demonstrates that even in a criminal justice system familiar with restorative justice, such as New Zealand, the number of sexual violence cases being dealt with by restorative justice is likely to be small.⁴⁸

The evaluation of Project Restore interviewed three victim-survivors and one offender, all of whom expressed their satisfaction with the restorative process. One victim-survivor stated that she gained ‘a lot of strength’ and ‘clarity’ from the process and another commented that although the process of recovery is slow, the restorative conference had started her on her journey.⁴⁹ Overall, the evaluation found that restorative justice processes ‘can provide a sense of justice in cases of sexual violence’.⁵⁰ Project Restore demonstrates that specially tailored processes can deal imaginatively with cases of sexual violence and provide some justice for the parties involved. While we cannot generalise from these small numbers, we can begin to see what ‘survivor driven’⁵¹ restorative justice in cases of sexual violence can look like and what it can possibly offer.

New Zealand’s Project Restore was inspired by the RESTORE programme established in Arizona in the US in the early 2000s.⁵² The Restore programme specifically tackles adult acquaintance rape and sexual assault, excluding rape in intimate relationships where there has been domestic violence. Its mission is to ‘facilitate a victim-centred, community-driven resolution of selected individual sex crimes that creates and carries out a plan for accountability, healing and public safety’.⁵³ It does this through restorative conferences and, while a full evaluation is awaited, information available so far details that in a two year period, there were 65 referrals from prosecutors which resulted in twenty conferences. As the leader of the programme Mary Koss suggests, Restore demonstrates that ‘carefully reasoned, safe, and respectful alternatives can be offered for sexual assault if we collaborate, consult and listen to the needs of our constituencies’.⁵⁴

There are further examples of projects using restorative practices to tackle cases of sexual violence, for example in Denmark⁵⁵ and South Africa,⁵⁶ but the information on these projects

⁴⁵ Jülich, above n 43, 246-247.

⁴⁶ Jülich *et al*, above n 14 at 29.

⁴⁷ It must not be forgotten that the process of assessment and evaluation may in itself have benefits for the survivor, even if a case does not proceed to a conference; Jülich *et al*, above n 14, 59.

⁴⁸ See Jülich, above n 43, 239-254.

⁴⁹ Jülich *et al*, above n 14, 58.

⁵⁰ Jülich *et al*, above n 14, vi.

⁵¹ Jülich *et al*, above n 14, 2.

⁵² M. Koss, ‘Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes’ in J. Ptacek (ed), above n 3, 218. Restore: Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience.

⁵³ Ibid 218-219.

⁵⁴ Koss, above n 52, at 219.

⁵⁵ In Denmark there is some experience of using victim and offender dialogue for cases of sexual coercion involving either correspondence between victim and offender, or face to face meetings. Karin Sten Madsen, a counsellor in Denmark working with the Centre for Victims of Sexual Assault in Copenhagen, suggests that for some women, mediation is a ‘necessary and rewarding step to take on the way to reclaiming a

is limited and evaluations not available.⁵⁷ However, in South Australia restorative justice is routinely used for youth sexual violence. Kathleen Daly's research in this jurisdiction presents the 'first empirical evidence on what happens when youth sexual offences go to court and conference'.⁵⁸ In essence, it was found that although courts can impose more serious penalties, the findings 'challenge those who believe that the court is the place that sends "strong messages" that serious offending is treated seriously, or that it holds greater potential to vindicate victims than restorative justice conferences'.⁵⁹ This is because in the conventional criminal justice system offenders readily deny any charges and attrition rates are high. Further, the study showed that the rehabilitative approach of the conference process had more positive results on reoffending compared with a traditional emphasis on 'scaring youth', by more often utilising specialist rehabilitative and counselling programmes.⁶⁰

The fact that offenders more readily admit guilt, and at an earlier stage, in the conference process means that victim-survivors more often gain a form of vindication and that this happens earlier on than in a court case. Further, the study showed that the court cases took considerably longer to finalise, possibly adding to any trauma of the victim-survivor.⁶¹ While this study cannot tell us about victim-survivor's experiences, and is focussed on youth offending, the results do 'underscore the limits of the formal court process in responding to sexual violence'.⁶² Daly asks those who express concerns over restorative justice conferences to take a wider view of the impact of court processes on victim-survivors.⁶³

Collectively, what these projects and analyses tell us is that there is an appetite among some victim-survivors, and those working with them, for forms of justice beyond the conventional criminal justice system. While evaluations of these projects do remain limited, with only a handful of victim-survivors recounting their experiences, they do suggest opportunities and possibilities for taking forward restorative justice for sexual violence victim-survivors.

II SEXUAL VIOLENCE AND RESTORATIVE JUSTICE: A CASE STUDY

subject position in their lives': K. Sten Madsen, 'Mediation as a Way of Empowering Women Exposed to Sexual Coercion' (2004) 12(1) *NORA: Nordic Journal of Women's Studies* 58, 60.

⁵⁶ The Phaphamani Rape Crisis Counselling Centre completed, during 2004-05, over sixty restorative conferences and over seventy victim-offender dialogues in the area of sexual violence. Little information is available about this project but it is reported that the staff engaged in these processes found that while the conferences and dialogues brought back the pain of assault to survivors, the participants were satisfied with the interventions. See A. Skelton and M. Batley, *Charting Progress; Mapping the Future* (2006) 33-34 and M. Koss and M. Achilles, 'Restorative Justice Responses to Sexual Assault' (2008) at http://www.vawnet.org/Assoc_Files_VAWnet/AR_RestorativeJustice.pdf.

⁵⁷ For a discussion of as US project which operates post-conviction and facilitates restorative dialogues between victims and offenders in cases of sexual violence, see S. Miller, *After the Crime: the power of restorative justice dialogues between victims and violent offenders* (2011).

⁵⁸ Daly, above n 6, at 350.

⁵⁹ Daly, above n 6, at 351.

⁶⁰ Daly, above n 6, 334-356, 351. However, Daly notes that it is the rehabilitation programme which appears to yield results and which could be attached to conventional justice responses.

⁶¹ Daly, above n 6, 352.

⁶² Daly, above n 6, 353.

⁶³ Ibid. See further K. Daly and S. Curtis-Fawley, 'Restorative Justice for Victim-survivors of Sexual Assault' in K. Heimer and C. Kruttschnitt (eds), *Gender and Crime: Patterns of Victimization and Offending* (2005) for an in-depth analysis of two case conferences and the victim-survivors' experiences which demonstrate some of the benefits and drawbacks of the conference process in these types of cases.

In February 2010 a restorative conference took place in the north of England. It involved a woman called ‘Lucy’,⁶⁴ who is an adult survivor of child rape and other sexual abuse. The rape and other sexual abuse took place over a period of five years, several decades ago, and the perpetrator was a male family member who was also a young person at the time.

We used a case study approach to investigate the experiences and expectations of four of the people involved in the conference, in order to explore the conference process, its outcomes and to understand any lessons which could be learnt from this experience when considering the potential possibilities of restorative justice for offences of sexual violence.⁶⁵ Accordingly, towards the end of 2010, we conducted semi-structured interviews with: Lucy, Lucy’s Rape Crisis counsellor, the conference facilitator and a senior police officer involved in the case.⁶⁶ The offender declined to be interviewed as part of our study, and he had chosen to attend the conference without a supporter meaning that no interview was available.

In undertaking a case study of this restorative conference, we were able to explore in depth the planning and preparation for the conference, the nature of the conference itself and its possible outcomes and impacts. The picture is incomplete in that we were unable to interview the offender which would have provided a valuable perspective on the process. Nonetheless, we were able to gain some insights into his participation and experience through the data provided by the other conference participants, though their perspectives on the offender’s experience must be treated with requisite caution. While the case study method does have limitations in terms of the general applicability of results, it furnished valuable in-depth data on the nature and process of a restorative conference dealing with sexual violence and, in particular, Lucy’s experiences.⁶⁷

1. How and why: ‘I just wanted him to hear me’

As noted above, Lucy is an adult survivor of child rape and other sexual abuse. While the abuse took place decades ago, she had only recently made a police report, being prompted by

⁶⁴ The woman at the centre of this case study read a draft of this article and we asked her what term she would like us to use when referring to her – ‘victim’, ‘survivor’, a combination of the two (i.e. victim-survivor or survivor-victim), or something else. She chose the name ‘Lucy’, feeling that none of the other labels truly represents how she feels.

⁶⁵ As a result of one of the authors’ involvement with the rape crisis movement, we became aware of Lucy’s conference and decided to undertake a case study of this one restorative intervention. This particular methodology was chosen in order to give an opportunity to hear in detail from the victim-survivor, providing a springboard for a discussion of the use of restorative justice in cases of sexual violence. In addition, this case study also gives voice to the experiences of a rape crisis counsellor involved in the process. The participation of such a professional in restorative conferences in the UK is extremely unusual and therefore affords a valuable opportunity to understand the perspective of someone who works closely with survivors of sexual violence and makes an important contribution to debates among violence against women activists and practitioners many of whom are opposed to the use of restorative justice in such cases.

⁶⁶ Interviewees were sent an indicative list of questions for preparatory purposes prior to the interviews, together with an explanation of the nature and purpose of the research. Contact was made with the victim-survivor through her counsellor. The conference facilitator made contact with the offender. The interview with the victim-survivor was conducted by telephone with a contemporaneous transcript being prepared by the interviewer. This method was used to maximise the victim-survivor’s anonymity. The other three interviews were conducted in person and a full transcript of each interview, which lasted approximately one hour, was prepared. Ethical approval was gained from the School of Applied Social Sciences Ethics Committee, Durham University.

⁶⁷ For further discussion of case study methodologies, see R.K. Yin, *Case Study Research, Design and Methods* (2002) and B. Flyvberg, ‘Five Misunderstandings about Case-Study Research’ in C. Seale *et al*, *Qualitative Research Practice* (2004).

a desire to protect other children in the family with whom the offender had been in contact (having previously told Lucy that he had avoided any contact with children). In addition, she was at a stage where she felt ready to talk about and report the abuse. Lucy made an official report to her local police, who she says treated her respectfully and took a thorough statement. However, the case was referred to the police force in which the offences took place, where a decision was made not to progress with the case on the grounds of it being historical and including an offender who was a juvenile at the time. In Lucy's words, she was 'disgusted' by this response, and she wrote to the offender and said that he should offer the police an interview. He did this, but the police decided to issue him with a caution. The fact that the offender had made an admission, Lucy says, 'gave him the opportunity to go round and say to everyone that I should forgive him because he did such a great thing.' Lucy felt 'completely discounted' by her experience with the criminal justice system for two main reasons. First, she was not kept informed of the outcome of the case, only finding out about the caution through a third party. Secondly, she was disappointed with the outcome: 'They just thought "caution him, that'll sort it out".' She did make a formal complaint to the police about her treatment, to which she received a response, but it remains the case that she felt let down by the police force which processed the offence.

It was during sessions with a rape crisis counsellor that the possibility of a restorative process of some nature was first raised. Lucy reports that she was talking through the whole process with the counsellor, and her disappointment with the police process, when she realised that 'the thing that had upset me the most was that I hadn't had my say and that he had just had his wrist slapped with no thought to what he had done'. The rape crisis counsellor explained that Lucy had 'got to the stage where she just wanted to go down to his house and bang on his door and confront him'. The counsellor then raised the possibility of some form of restorative process solely because of Lucy's wish to confront the offender. It was very important for the counsellor that the idea of talking to the offender came from Lucy herself. Through contacts with local police, the counsellor was put in touch with a restorative justice facilitator who works at a senior level for a national crime reduction charity. The facilitator has extensive experience of restorative conferences, though not in the area of sexual violence, in view of its limited use in this field.

The facilitator made contact with the offender and spoke to him approximately four times prior to the conference. The offender was reluctant to participate at first. The facilitator speculates that a possible reason why he agreed to participate was that he was 'looking for some sort of excuse for his behaviour' and thought that the conference might help in this way, particularly in terms of re-establishing some sort of contact with family members. However, since we were not able to interview the offender we cannot know his actual reasons for participation. Lucy is clear about why she wanted a restorative conference to take place: 'I just wanted him to hear me, without him twisting it really.'

2. *'Preparation is key'*

Once a decision had been reached to undertake a restorative conference, all of the interviewees commented on the importance of the preparation phase. In the three months prior to the conference taking place, Lucy and her counsellor met weekly. From the counsellor's perspective, it was important to risk assess the conference and what might happen afterwards: 'It was all about looking at every eventuality, what was the worst case scenario, what was the best case scenario, how to prepare her ... so that she could go into that

room ... we discussed power dynamics, we discussed all the potential things that she could feel in that room with him, so that she had considered everything.’

A key feature of this preparation was working through the restorative justice ‘script’ to be used in the conference which set out the order in which participants speak and the issues to be addressed.⁶⁸ The advantage of this established format became clear during the preparation when Lucy and her counsellor were able to understand well in advance how the conference was to proceed, what questions were to be asked and what opportunities each participant would have to speak. Lucy found this very important and prepared written notes: ‘Another really positive thing about [the conference] was the sheer structure – it enabled me to plan and prepare and make sure that I said everything I wanted to say.’ Lucy and the counsellor then rehearsed how the conference might go, with the counsellor giving responses that might be given and might prove distressing for Lucy. They agreed that if Lucy did not feel able to speak or get her points across during the conference, that her counsellor would be empowered to do this for her. This process of planning what to say to explain the impact of the abuse was ‘hugely stressful’ for Lucy, who explained that it was hard to prepare ‘without getting sucked in and feeling bad about it’.

3. The restorative conference: having the ‘last word’

The conference took place in a location that was familiar to Lucy which was a deliberate decision to ensure she felt comfortable; it was also a safe environment. Detailed arrangements were made relating to everyone’s arrival and entrance to the conference room, to ensure that Lucy and the offender did not come into contact, other than during the conference. Lucy and her counsellor arrived first and were settled in the room. The facilitator met with them to ensure that Lucy wished to proceed and understood the conference process. The facilitator met with the offender and ensured that he too understood the process and then brought him into the conference room.

The conference, which lasted just under an hour, followed the restorative script, meaning that the focus was first on the offender to explain his actions. This is a fundamental stage in the restorative process as being where the offender acknowledges responsibility for the acts and is asked to explain his actions. The counsellor recalls how during this first part of the conference the offender was ‘very, you know, careful how he answered, minimising his behaviours, also being very defensive’. In addition, the offender at this stage was refusing to look at and address Lucy with his comments. The counsellor recalls how the facilitator told the offender that he needed to look at Lucy. The counsellor also, at one stage, intervened and said: ‘I notice that you’re saying you feel shame but you’re not saying that to [Lucy].’ The facilitator similarly intervened when, having accepted responsibility, the offender sought to blame his actions on his difficult experiences as a child. The facilitator challenged him and explained that if he was not going to accept responsibility then the conference would need to end, after which the offender did acknowledge his responsibility.

Lucy explains that, at first, it was difficult to understand why the offender was asked to speak first: ‘At the time I thought why are you letting him talk so much?’ However, on reflection

⁶⁸ This restorative justice ‘script’ was developed by Terry O’Connell, see T. O’Connell et al, *Conferencing Handbook: The New Real Justice Training Manual* (1999) and is available at <http://www.realjustice.org/articles.html?articleId=662>. The scripted conference is just one form of restorative process, with others following alternative procedures and approaches. For a discussion, see M. Umbreit and M. Armour, *Restorative Justice Dialogue – an essential guide for research and practice* (2010).

she states that: 'I realised later how important that bit was, because it was the first time he admitted that he had deliberately created harm and that he knew that having sexual intercourse with me would be harmful.'

Once the offender had admitted the offences and provided an explanation as to why he did what he did, Lucy had the opportunity to explain how the abuse had affected her. She explained that this 'enabled me to say exactly how it had affected me, and he obviously hadn't realised that it had had such far reaching effects on me. Before that, he and some other members of the family assumed that it had had more impact on him, his getting into drugs etc'. Lucy noticed that 'you could see his demeanour changing when I was talking, as the conference went on'.

In addition, the counsellor spoke, in general, about how rape and sexual abuse impacts on people. Lucy had asked the counsellor to contribute to the conference in this way. The counsellor explained that she gave 'a professional opinion as to how rape and sexual abuse impacts on somebody so that the offender could be aware that, although he was looking very specifically at their circumstances, [Lucy] felt that he would have no awareness ... of what she'd been through'. In addition, the counsellor notes that: 'she was adamant she didn't want him to see her as a victim. So she ... kind of wanted a more general view' of how abuse affects people. As well as aiming to convey to the offender how abuse affects people in general, this strategy was devised so that Lucy 'would be in control of how much information she wanted to give out about herself personally ... because although she wanted to get across to him how much damage he'd done to her life, she didn't want him to see her as a very vulnerable, kind of, you know, weak person. In a sense, she wanted to be able to come out of there with her head held high and meet him on an equal level' (counsellor).

The counsellor recalls that after Lucy had spoken, the offender was asked for his response. She recalls that 'he did feel a kind of shame about what he'd done, so he almost physically shrank during that time ... he was a bit overcome by what had gone on in that room and it was, like, a start to raising his awareness and it was just incredibly difficult for him'.

In terms of outcomes, Lucy recalls the offender saying sorry. But, she states: 'I had the last word and said that I didn't accept his apology'. The main outcome Lucy requested was that the offender was to stop trying to make contact with her through other members of the family. At the time we interviewed her, the offender had made no such attempts. After the conference, Lucy and her counsellor de-briefed, and the facilitator had a short de-brief with the offender.

4. Impact: 'a really big turning point'

Overall, Lucy states that the conference 'was a really big turning point for me actually. Instead of having this whole episode of my life that I couldn't do anything with, I could stop hating myself and put the blame where it should be'. Nonetheless, it took some time after the conference for her to reach this understanding. The conference itself left her 'drained' and it 'dangerously unhinged me at the time because it was like reliving it'. But on further reflection, she began to feel differently. Having the offender explain 'why he did it' was 'key' for her; as was the fact that she had the 'last word'. It was important for her that she had 'her say' and commented that 'it's made me understand my position as a victim and see him as the offender, which has enabled me to resolve a lot of conflict [...] in retrospect ... it was more important to have my say and have him listen than for him to go to prison'.

From the counsellor's perspective, 'by the end of the conference, I think everything had come out, certainly what she wanted to say [...] I think we almost reached our objectives in terms of the messages that we wanted to get across'. During the conference, she reflected that Lucy 'kind of almost seemed empowered, and I think that was partly because of the way he [the offender] behaved'. The counsellor remembers the offender saying that he 'hadn't appreciated the damage he could do, and that it had made him think'.

The facilitator's recollection, from his de-brief with the offender, is that the offender 'felt it had been a good experience', albeit difficult: 'he did say to me on the train, that's the hardest thing I've ever done in my life'. For the facilitator, the conference was 'ok'. His reticence is 'because it was such a different subject matter' but, in the end, he thinks it 'served a purpose and it felt right'. Overall, therefore, it seems clear that from Lucy's perspective, the conference was beneficial for her and led to positive outcomes. The two professionals involved both consider that the conference achieved its objectives.

5. Lessons: 'never underestimate the strength of victims'

For Lucy and her counsellor, the two most significant lessons to be drawn from this restorative conference are the need for intensive, survivor-focused support and detailed preparation by someone experienced in this area of work. Lucy acknowledged that she 'needed a lot of support' from her rape crisis counsellor, as well as another mental health professional. She also felt supported by the local police force. Although Lucy had support from family and friends, it was the professional support which she saw as essential. For her counsellor, the 'success or failure' of a restorative conference is dependent on the planning. Preparation is, of course, important for all parties, including the offender. The facilitator explained that in preparation there has to be honesty with the offender, making clear that the process will not be easy.

Alongside Lucy's general optimism about the positive outcomes a conference can bring, she also expressed the view that a restorative conference may not be 'appropriate' for everyone. The counsellor was of a similar view, noting that some offenders may 'be so abusive that there's not going to be anything good coming out of it'. Whether the conference is appropriate will also depend on the stage of recovery of the victim-survivor. From Lucy's perspective, she was 'sufficiently strong' and so it 'came at a good time for me'. In a similar vein, the counsellor suggests that the use of restorative justice for cases of sexual violence should depend not on types of offences per se, but rather on the individuals and whether they are ready for such a process. She continues: 'Over the years ... I'd say a reasonable percentage of [victim-survivors] have said at some stage that they'd love to ... to confront their offender, or love to have some questions answered ... And I guess they probably haven't thought through all the implications of that, but ... for those people I think the opportunity should be there and I don't think that's reliant necessarily on the offence'.

The counsellor was very clear that any victim-survivor going into a restorative conference needs professional support, particularly someone knowledgeable and experienced about the power dynamics that are inherent in cases of sexual violence. She continues that: 'I went in there very prepared that if I thought there was going to be a power shift that we would address that'. So, it is essential that 'you've got the right people in there who are looking for the right things to protect the victim'. Similarly, Lucy was of the opinion that she had the

right type and level of support: ‘someone like [the rape crisis counsellor] would be the ideal. She was stunning.’

In relation to the offender, the counsellor and facilitator were both of the view that ideally he would have had a supporter with him and follow-up care in place. The facilitator had suggested that he could bring someone but he chose not to. Lucy’s counsellor acknowledged that ideally ‘both people need a proper de-brief’ to check what sort of support they have and to signpost them if necessary to available resources. The offender could ‘potentially come out of [the conference] as vulnerable as the victim can’ (counsellor). The facilitator agreed that support for the offender should ideally be in place in any future conferences.

This conference took place after criminal justice interventions (resulting in a caution) and the counsellor is of the view that this was an appropriate stage for a restorative conference because Lucy felt that she had not had any justice. Also, at this stage, ‘the offender doesn’t have anything to gain and I think you’ve got more chance of them coming into [the conference] with a genuine desire to learn from it themselves’ (counsellor). In addition, the counsellor thought that restorative conferences could be used in cases which have been dropped from the criminal justice system where there might be ‘really good potential for restorative justice because they’re not going to get any justice through the normal criminal justice system’.

We asked Lucy whether she thought a restorative conference would work equally well for someone who had not reported to the police. She replied: ‘I think it could work just as well, because the police did bugger all anyway. The reporting to the police was my way of telling [the offender] that I wasn’t happy with it and that he had gone his whole life without any consequence.’ As already noted, the local police force to which she made her initial report gave her an excellent response; it was the investigating force that she felt failed her. The local police force, supporting this conference, were clearly alert to the limitations of the criminal justice system in cases such as these, with the senior police officer involved noting that: ‘I’ve always felt that victims get a raw deal. And I’ve always recognised that the traditional criminal justice system offers absolutely nothing to victims and they’re re-victimised in the process.’

Before taking restorative justice in cases of rape and sexual violence further, the counsellor considers there should be discussion and ‘consultation’ among women and groups working with survivors. Restorative justice, she says, is ‘fraught with dangers’ in these situations because of the ‘power dynamics’ and she therefore understands the reticence felt by some women’s organisations. However, she continued that: ‘I think we can’t underestimate the power of the women or the men that we work with in these situations and ... that’s why I think with the proper preparations and proper risk assessment that giving somebody an opportunity to help themselves can only be a positive thing’. We should ‘never underestimate the strength of victims.’ Finally, she concludes that: ‘If we just dismiss it and say that we shouldn’t do this then we’re depriving people of that opportunity which can ... be beneficial.’ Similarly, the senior police officer we interviewed felt that people should be given the option of restorative justice and that failing to do so was patronising and implied that victims were not able to make a ‘rational choice’.

III JUSTICE FOR VICTIM-SURVIVORS: ‘HONOURING THE EXPERIENCE’

Lucy's experiences of dissatisfaction with the criminal justice system and desire to have her voice heard chime with recent developments in law and policy regarding rape and other forms of sexual violence. Despite significant improvements in recent years in the treatment of rape victim-survivors and important legal and procedural reforms, it remains the case that so many victim-survivors feel betrayed by a criminal justice system which appears to marginalise their interests and affords them so little justice. Thus, the influential 2010 Stern Review into the handling of rape complaints stated that the 'support and care for victims should be a higher priority' than it currently is and that a broader approach to measuring 'success' and outcomes in relation to victims than just a focus on convictions needs to be developed.⁶⁹ Accordingly, Stern stated that while a conviction is a 'very worthwhile outcome', victims wanted more. In essence, Stern concluded, what victims want are processes which 'honour the experience'.⁷⁰ Honouring the experience does not necessarily equate to securing a conviction, but encompasses being believed, dignified treatment, safety, support services, feeling in control and the ability to make informed choices.⁷¹ This approach echoes the findings of Liz Kelly et al who have stressed the importance for victim-survivors of 'procedural justice', even where substantive justice is not forthcoming.⁷²

We can see, therefore, a discernable shift in public policy towards greater emphasis on prevention, victim support and dignity of treatment, away from a predominant focus on the criminal justice system and the pursuit of increased conviction rates.⁷³ This shift reflects the expressed views of many victim-survivors. For example, Judith Herman found that the needs and wishes of victim-survivors were often diametrically opposed to the requirements of formal legal proceedings.⁷⁴ Herman also found that victim-survivors' most important objective was to gain validation by a 'denunciation of the crime' which 'transferred the burden of disgrace' to the offender.⁷⁵ The goal most commonly sought was exposure of the offender, as an offender, it being more important to 'deprive the perpetrator of undeserved honor and status than to deprive them of either liberty or fortune'.⁷⁶ In a similar vein, Shirley Jülich's interviews with victim-survivors of child sexual abuse found that a common theme was the desire to tell their story in a way that was meaningful for them and in a safe environment.⁷⁷ Jülich reported that all victim-survivors in her study criticised the criminal justice system for denying them 'a voice' and an active role in proceedings, both of which contributed to their lack of confidence in the system.⁷⁸

If the conventional criminal justice system is so poor at meeting victim-survivors' needs, the question arises as to whether restorative justice is a suitable additional option. Barbara Hudson writes that restorative justice potentially offers victim-survivors empowerment as

⁶⁹ Baroness Stern, *The Stern Review – An Independent Review into how Rape Complaints are Handled by Public Authorities in England and Wales* (2010) at 11.

⁷⁰ Ibid at 9, 101-102.

⁷¹ As set out in Payne, above n 8 at 14.

⁷² L. Kelly et al, *A Gap or a Chasm? Attrition in Reported Rape Cases* (2005) at 87-89.

⁷³ This approach can also be identified in the feminist literature on rape. See W. Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27; K. Daly and B. Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis Across Five Countries' (2010) 39 *Crime and Justice* 565; and C. McGlynn, 'Ken Clarke was right to start a debate about sentencing', *The Guardian* 19 May 2011.

⁷⁴ J.L. Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571 at 574.

⁷⁵ Ibid at 585.

⁷⁶ Herman, above n 74 at 593.

⁷⁷ S. Jülich, 'Views of Justice among Survivors of Historical Child Sexual Abuse – Implications for Restorative Justice in New Zealand' (2006) 10(1) *Theoretical Criminology* 125.

⁷⁸ Ibid, 131.

they are in control of telling their story, their way.⁷⁹ While Julie Stubbs reminds us that we must not assume that ‘women who have been abused are well equipped to speak in their own interests’,⁸⁰ for some a restorative process can be about ‘telling the story’ and ‘taking back personal power’ which can be an important part of the healing process.⁸¹ For others, an additional element to telling their story is addressing it directly to the offender.⁸²

Whilst being aware that empowerment may only be offered within ‘specific parameters’ in restorative justice,⁸³ it may nonetheless provide valuable and meaningful participation in the justice process to an extent not possible in the conventional criminal justice system. Further, as the offender has admitted the offence, the victim-survivor is provided with an acknowledgement of responsibility which few gain through the criminal justice system.⁸⁴ For some victim-survivors, this acknowledgement of responsibility can be very significant; for some, more so than levels of punishment measured by imprisonment.⁸⁵

For these and many other reasons, Barbara Hudson argues that restorative justice could carry out the ‘traditional functions of criminal justice – retribution, rehabilitation/reintegration, individual and public protection – better than formal justice does’.⁸⁶ In other words, it may offer more *effective* justice.⁸⁷ In a similarly optimistic vein, C Quince Hopkins and Mary Koss argue that a restorative justice response which ‘triggers some consequences for the violence is at least an improvement’ and that, indeed, restorative practices hold ‘great potential for deconstructing systemic belief systems and norms on which gendered violence rests’ by its possibility to increase community understanding of these offences and encourage more victim-survivors to come forward.⁸⁸ Restorative justice, therefore, offers the possibility of therapeutic benefits for some victim-survivors, as well as contributing to a wider sense of justice being done.⁸⁹

⁷⁹ B. Hudson, ‘Restorative Justice and Gendered Violence – Diversion or Effective Justice’ (2002) 42 *British Journal of Criminology* 616 at 624, citing L. Hulsman, ‘The Abolitionist Case: Alternative Crime Policies’ (1991) 25 *Israeli Law Review* 681.

⁸⁰ J. Stubbs, ‘Shame, Defiance and Violence Against Women’ in J. Bessant and S. Cook (eds), *Women’s Encounters with Violence – Australian Experiences* (1997) 122.

⁸¹ K. Pranis, ‘Restorative Values and Confronting Family Violence’ in H. Strang and J. Braithwaite (eds), above n 3, 30. On the therapeutic benefits of post-conviction restorative justice in cases of sexual violence, see Miller, above n 57, and Sherman and Strang, above n 25 at 64 who note the evidence that restorative justice can reduce some of the harmful symptoms associated with post-traumatic stress.

⁸² Amanda Konradi reports that in her study of victims’ participation in sentencing hearings: ‘All but one who stood up and confronted their assailants silently or verbally reported obtaining a feeling that they had moved beyond the rape event in some emotional way.’ See ‘Creating Victim-Centred Criminal Justice Practices for Rape Prosecution’ in S.L. Burns and M. Peyrot (eds), *New Approaches to Social Problems Treatment (Research in Social Problems and Society, vol 17)* (2010) 52.

⁸³ K. Cook, ‘Doing Difference and Accountability in Restorative Justice Conferences’ (2006) 10(1) *Theoretical Criminology* 107, 121.

⁸⁴ Nonetheless, an offender admission of responsibility is complex in that, as Julie Stubbs discusses, while an offender ‘may admit his conduct, those words or behaviours may be minimized, neutralized or their significance may be opaque to others’: J. Stubbs, ‘Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice’ (2007) 7 *Criminology and Criminal Justice* 169 at 173.

⁸⁵ See, for example, the experiences of victims discussed in A. Konradi, above n 82.

⁸⁶ Hudson, above n 79 at 626.

⁸⁷ Hudson, above n 79 at 626, emphasis in original.

⁸⁸ C. Quince Hopkins and M. Koss, ‘Incorporating Feminist Theory and Insights into a Restorative Justice Response to Sex Offenses’, (2005) 11(5) *Violence Against Women* 693 at 714-715.

⁸⁹ On the inter-relationship between therapeutic benefits and a sense of justice, for victim-survivors of sexual violence, see C. McGlynn, ‘Feminism, Rape and the Search for Justice’ *Oxford Journal of Legal Studies*, forthcoming.

In the light of such potential benefits, and the experiences of Lucy and other victim-survivors of restorative justice, we suggest that it is time to move beyond a one dimensional focus on the conventional criminal justice system. This most definitely does not mean abandoning reform of the criminal justice system: such efforts must continue as there will always be a central role for the criminal justice system in dealing with sexual violence. But it does mean that acknowledging its limitations requires us to consider new ways of thinking and new forms of justice which ‘honour the experience’ of victim-survivors. Women’s experiences of sexual violence are highly varied and their expectations and desires diverse. The evidence presented here is one case study; one victim-survivor’s perspective. But, when added to the voices of other victim-survivors, we should not ignore it. A response attentive to such diversity must therefore accommodate this variety, by providing multiple options for victim-survivors, such as restorative justice.⁹⁰ Combining the individual perspective with systemic analyses is a significant challenge,⁹¹ but, as Hopkins and Koss suggest, it is an ‘unavoidable tension when we insist that women’s voices and preferences matter’.⁹²

IV MOVING FORWARD: THE POSSIBILITIES OF RESTORATIVE JUSTICE

John Braithwaite and Heather Strang have suggested that the ‘tentative’ evidence of victim satisfaction in restorative programmes is ‘sufficient to impose an obligation’ on us all to be ‘open to the possibility’ that restorative justice has something to offer.⁹³ We should, therefore, consider afresh the possibilities of restorative justice in cases of sexual violence.⁹⁴ The development of restorative justice in cases of sexual violence must, necessarily, be cautious at this stage, and must be preceded by further debate, evaluations and careful planning, as considered below.

1. *Above the parapet: restorative justice in cases of sexual violence in the UK*

If we are to move forward with restorative justice, the on-going work in this area must move from ‘under the radar’ to being ‘above the parapet’. Thus, the first step must be to bring some clarity and transparency to current uses of restorative justice in cases of sexual violence. As noted above, restorative justice processes are currently being used in Northern Ireland and in some referral orders in England and Wales, but we do not have information about the number or range of cases. Nor is any information widely available about what guidance or protocols have been issued or are being followed where sexual offending is at issue. It is essential, therefore, that there is disclosure of the number and range of restorative processes being used in both jurisdictions and that any guidance or protocols are made publicly available. Where evaluations of the use of restorative justice in referral orders for sexual offending have been undertaken, they should be published.

Secondly, an evaluation of Northern Irish restorative youth conferences involving sexual offences must be undertaken so that it can be determined whether, amongst other issues, the reported high satisfaction and participation rates, and lower re-offending rates, apply equally

⁹⁰ Quince Hopkins and Koss, above n 88, at 707.

⁹¹ As discussed in Elizabeth Schneider, ‘Particularity and Generality: challenges of feminist theory and practice in work on woman-abuse’ (1992) 67 *New York University Law Review* 520.

⁹² Quince Hopkins and Koss, above n 88 at 707.

⁹³ J. Braithwaite and H. Strang, ‘Restorative Justice and Family Violence’ in H. Strang and J. Braithwaite (eds), above n 3 at 4.

⁹⁴ For a discussion of the value of restorative approaches from a sexual offender perspective, see A. McAlinden, *The Shaming of Sexual Offenders – Risk, Retribution and Reintegration* (2007).

to conferences involving sexual offences committed by juvenile offenders. Such an evaluation is imperative as international experience suggests that where sexual violence cases are included as part of a generic programme – such as restorative youth conferencing and referral orders – the specific needs of victim-survivors, and the real dangers of re-victimisation, are not always taken seriously.⁹⁵ For such reasons, Julie Stubbs argues that gendered harms ‘cannot be subsumed within existing generic restorative practices without significant risks to victims’ interests’⁹⁶ and emphasises that for victim-survivors of gendered violence, the details and specifics of each scheme matter ‘profoundly’.⁹⁷ This point is currently extremely pressing as the UK Government contemplates the development of generic restorative processes across the youth justice system.⁹⁸

The third step must be extensive debate and consultation among the different professional communities engaged in this line of work, including restorative justice practitioners, those working with offenders and those organisations such as rape crisis which work with victim-survivors of sexual violence.⁹⁹ This process of engagement and consultation is necessary to ensure the incorporation of specialist knowledge into any future programmes, to develop understanding amongst user communities so that myths regarding the role and outcomes of restorative justice are not perpetuated and to ensure that there is appropriate advice and support available for victim-survivors. At present, each of these communities tends to occupy separate professional spaces with little transfer of knowledge and understanding, to the detriment of those for whom they are working.

2. Risk assessment, planning and support

It is clear from our case study and other research that restorative interventions in cases of sexual violence demand risk assessment and planning over and above that usually required. The practice guidance developed by the AIM project addresses these differing needs.¹⁰⁰ While it is known that this guidance has been used in some of the UK restorative justice cases involving sexual violence, we do not know to what extent it, or similar guidance is routinely used; nor how its use is monitored, if at all. Restore in Arizona has also made available the detailed protocols and guidance it has produced in relation to its restorative justice project which demonstrate the care and levels of detail necessary to ensure a safe and effective programme.¹⁰¹

The expertise and training of key personnel is also crucial. The recently updated best practice guidance from the Restorative Justice Council makes clear the ‘additional knowledge and

⁹⁵ See, for example, the discussion in R. Busch, ‘Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong?’ in J. Braithwaite and H. Strang (eds), above n 3 and ‘Editorial: Restorative Justice and Domestic Violence – Contributions to a Never-Ending Debate’, European Forum for Restorative Justice Newsletter (vol 11(3), 2010) 1, at <http://www.euforumrj.org/readingroom/Newsletter/Vol%2011%20Issue%203.pdf>.

⁹⁶ Stubbs above n 80, 180.

⁹⁷ J. Stubbs, ‘Restorative Justice, Gendered Violence and Indigenous Women’ in J. Ptacek (ed), above n 3, 104.

⁹⁸ Ministry of Justice, above n 9.

⁹⁹ Such as the AIM 2006 conference which brought together those working with sex offenders and restorative justice practitioners. See: http://www.aimproject.org.uk/index.php/news/article/restorative_justice_and_adolescent_sex_offending_conference/.

¹⁰⁰ For further information, see http://www.aimproject.org.uk/index.php/models_and_guidelines/article/98/.

¹⁰¹ Koss, above n 52, 219.

skills' required of facilitators to tackle cases of a 'serious violent or sexual nature'.¹⁰² Facilitators, the guidance specifies, must be aware of the risks of further harm to a victim caused by intimidation, blaming of the victim, minimisation of the impact of an offence, dangers of manipulation and/or offender motivation to cause further harm.¹⁰³ This mirrors United Nations guidance which stipulates that facilitators 'must be very conscious of subtle manipulation and intimidation of the crime victim by the offender prior to, during and following a restorative process' involving domestic or sexual violence.¹⁰⁴ We are also firmly of the view that all victim-survivors should have the benefit of a supporter to assist them through any restorative process, such as a rape crisis counsellor or other professional experienced in working with sexual violence survivors.

What is clear is that knowledge and experience of supporting sexual violence survivors, together with preparation and planning, are essential to the 'success' of any restorative intervention. Furthermore, it should not be underestimated how time-consuming and therefore resource intensive this is. The rape crisis counsellor in our study met with Lucy for around twelve one-hour sessions to plan and prepare for the restorative conference, in addition to organisational time and requirements. Lucy also had on-going mental health support both before and after the conference. Moreover, in any case or project, there will also be the time and costs of facilitators and offender-related support.

3. Restorative justice and the criminal justice system

Turning to consider the development of restorative initiatives in this area, we should be open to the continuing ad hoc uses of restorative justice in cases of sexual violence, where there is appropriate planning and support. As in the case study presented here, if carefully and thoughtfully undertaken, these processes may yield some positive outcomes for victim-survivors.¹⁰⁵ The consultations and evaluations suggested above will assist in developing knowledge and understanding of this area and, in time, may provide more opportunities for victim-survivors to undertake restorative interventions.

In addition, because of the reluctance to report sexual violence to the police, we must not limit the possibilities of securing some form of justice only to those who feel able or willing to report to the prosecuting authorities. Restorative interventions, therefore, should be available to victim-survivors even where there is no report to the police. Further, restorative justice should also be available long after the conventional criminal justice system has run its course, whatever the outcome.

¹⁰² Restorative Justice Council, *Best Practice Guidance for Restorative Practice* (2011) 22.

¹⁰³ *ibid*, 22.

¹⁰⁴ United Nations Office on Drugs and Crime, UN Handbook on Restorative Justice Programmes (2006) 70, at http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf.

¹⁰⁵ That this case study involved child rape by a young family member, therefore having particular features, raises the question of its applicability to other forms of sexual violence. There are debates over whether restorative justice is especially suited to specific sexual offences, with some victim advocates, for example, suggesting that it may be especially appropriate for cases of familial abuse due to the even greater reluctance to report in such cases and the common need or desire for on-going communication: Curtis-Fawley and Daly, above n 15 at 629-630. Nonetheless, the evidence that is available suggests that restorative interventions may have positive outcomes in a range of sexual violence cases: see discussion in part I above. This may be due to the adaptability of restorative justice to the specific circumstances of each case. In addition, as the rape crisis counsellor in this case study suggested (part II above), it may be more appropriate to think of the applicability of restorative justice in terms of the interests and stage of recovery of the victim-survivor, and on the nature of the particular offender, rather than on the specific type of offence.

In time, and again with appropriate consultation and planning, restorative processes could be developed which are undertaken as part of the criminal justice treatment of a complaint of rape or sexual abuse. In addition, specific projects may be developed, similar to Project Restore in New Zealand, which are carefully designed with the needs of sexual violence victim-survivors in mind. In our view, the focus of such initiatives should not be on particular offences or particular types of offenders, as this may not take sufficient account of victim-survivor experiences or needs. Thus, it is important to highlight that from victim-survivors' perspectives, the continuities and similarities between various forms of sexual violence provide little basis for differentiating provision between 'serious' and 'less serious' sexual offences.¹⁰⁶ Further, in view of our suggested focus on victim needs and wishes, we do not see any reason for limiting restorative justice to only those offences committed by young people, so long as the appropriate risk assessments and planning is carried out.

But importantly, if restorative interventions are to be truly victim-centred, there must be flexibility and a range of options. As Tony Marshall has argued, there are strong reasons for not limiting the use of restorative justice to particular stages of the criminal justice system so that it can be offered to victims 'at a time that is most suitable' for them.¹⁰⁷ Indeed, he makes specific reference to rape victim-survivors who may not be ready for a restorative process until 'several years' after an offence.¹⁰⁸ In addition, it may be that interventions are needed with some offenders to support any restorative process. Research by Ben Wallace and Marnie Doig has suggested that therapeutic interventions for young sexual offenders helped to prepare the groundwork for more effective restorative processes.¹⁰⁹ In sum, there should ideally be a range of restorative options to meet the diverse needs and interests of victim-survivors. With this flexibility, proper precautions and careful planning, we may be able to increase the opportunities for victim-survivors to achieve some measure of justice.

V CONCLUSIONS

Reforming law and policy relating to sexual violence has been a key focus for feminist campaigning over the past thirty or more years. This activism has resulted in considerable changes in the practices of the criminal justice system, in public attitudes and in the criminal law, though with little apparent effect in terms of demonstrable reductions in the prevalence of sexual violence or increase in conviction rates. The paradox is that while we may accept that criminalisation and penalisation do not create safer communities for women,¹¹⁰ nor meet the needs and expectations of victim-survivors, society has found it hard to resist the siren call of punishment and condemnation via the conventional criminal justice system.

¹⁰⁶ See further L. Kelly, *Surviving Sexual Violence* (1988) and L. Kelly and J. Radford, 'Sexual Violence Against Women and Girls', in R.P. Dobash and R.E. Dobash (eds), *Rethinking Violence Against Women* (1998), 56-63.

¹⁰⁷ Marshall, above n 12 at 25. For example, in a study of victim-offender dialogue in the US, it was found that the average length of time from the commission of the crime to the dialogue was 9.5 years: Umbreit *et al*, 'Victim Offender Dialogue in Crimes of Severe Violence' (University of Minnesota, 2003) at http://www.cehd.umn.edu/ssw/rjp/resources/rj_dialogue_resources/VSOD_Severe_Violence/Exec_Sum_TX_OH_VOD_CSV.pdf.

¹⁰⁸ Marshall, above n 12 at 25.

¹⁰⁹ B. Wallace and M. Doig, 'Sexual Offending and Restorative Justice – The Challenge for Family Conferencing Practice in South Australia', cited in K. Daly, 'Sexual Assault and Restorative Justice' in H. Strang and J. Braithwaite (eds), above n 3, 78.

¹¹⁰ See, for example: L. Snider, 'Toward Safer Societies: Punishment, Masculinities and Violence Against Women' (1998) 38 *British Journal of Criminology* 1; Hudson, above n 79 at 629

Reforms to the criminal justice system are an essential part of ensuring that sexual violence is taken seriously and that attempts to minimise and privatise these harms are resisted. But such reforms should not be the sole focus of change, nor should conviction rates be the single measure of 'success'.¹¹¹ The Stern Review of the treatment of rape complaints called for changes which 'honoured the experience' of rape and sexual assault. Judith Herman found that for some victim-survivors, their 'marginal role' in the justice system was a 'humiliation only too reminiscent of the original crime' and consequently called for us to imagine what justice might look like if victims were 'protagonists, rather than peripheral actors'.¹¹² Others have similarly called for a 'redefinition' of justice to take greater account of the needs of victims.¹¹³

Restorative justice in cases of sexual violence has a role to play in meeting some of the needs and expectations of some victim-survivors, by giving them a voice by which to tell of their harm, by granting a measure of control over the treatment of their complaint, by helping to ensure that their experience is honoured, treated seriously and with respect, such that they gain some measure of justice. This approach must not pit restorative justice against conventional criminal justice in some sort of mirror of the adversarial process itself. Each process has its role; each has limitations. Julie Stubbs rightly contends that we must move beyond oppositional contrasting of restorative justice and conventional criminal justice and work towards 'hybrid developments'.¹¹⁴

By moving in this direction, towards offering restorative justice in some cases of sexual violence, we must recognise the challenges. But if we are to be attentive to the needs and expressed wishes of victim-survivors, we must be open to considering new developments and opportunities. Restorative justice in cases of sexual violence does demand greater scrutiny and expertise, greater preparation and risk assessment and therefore greater resources. But excluding victim-survivors of sexual violence from the opportunity to address their offender, tell of their harm and see some form of justice, for those who request it, cannot be justified.

Indeed, we asked Lucy, the victim-survivor at the heart of our case study, what she would say to another woman considering restorative justice in similar circumstances. She replied that if the woman was at the right stage in her recovery, sufficiently strong to undertake a conference, and after ensuring the necessary professional support and careful planning, then she should: 'take a deep breath and do it'.

¹¹¹ Indeed, as Wendy Larcombe details, there is a danger that a singular focus on increasing conviction rates could undermine other feminist aims of rape law: Larcombe, above n 73.

¹¹² Herman, above n 74 at 582 and 579.

¹¹³ Payne, above n 8.

¹¹⁴ Stubbs above n 97 at 104.